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AUTHORITIES.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

JOHN H. BREDE, APPELLANT,
v.
JAMES M. POWERS, AS UNITED STATES Marshal for the Eastern District of New York, Appellee.
No. 45.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The United States Attorney for the Eastern District of New York filed, on April 7, 1920, a criminal information charging John H. Brede with a violation of Section 21, Title II, of the National Prohibition Act. (41 Stat. 305.) On June 15, 1920, the defendant was placed on trial, and after a verdict of guilty by the jury, the judgment of the court was entered, by which defendant was sentenced to pay a fine of $500.00 and be imprisoned for sixty days. (R. 3.) The institution in which it was ordered the defendant be confined is the County Jail of Essex County, New Jersey. (R. 5.)

A writ of habeas corpus was issued on January 5, 1922, by the District Court for the Eastern District

of New York on the petition of defendant, and after a hearing it was ordered that the writ be dismissed. From the order and decree dismissing the writ of habeas corpus the applicant entered his appeal to this court.

Issues not properly raised by writ of habeas corpus.

Defendant sought by writ of habeas corpus to test the validity of the procedure by which he was tried, convicted, and sentenced. He claims that his constitutional rights were violated by proceeding against him by information rather than by indictment. He could have appropriately raised this question by writ of error but did not avail himself of that remedy and allowed the time to take a writ of error to expire, thus effectually acquiescing in the judgment rendered. From the judgment of the District Court he had, on this constitutional question, a right of review by this court by direct writ of error, or he could have taken the entire case to the Circuit Court of Appeals. Neglecting these remedies, he now tries to review the judgment of the District Court by habeas corpus. The Supreme Court has declared again and again that a writ of habeas corpus may not be used as a substitute for a writ of error (*Riddle* v. *Dyche*, U. S. Supreme Court decided, May 21, 1923; *Frank* v. *Mangum*, 237 U. S. 309, 326; *Glasgow* v. *Moyer*, 225 U. S. 420), but counsel in this and other cases seem unwilling to accept this conclusion. The District Court had general jurisdiction to determine whether the Prohibition law was violated.

If an information was an improper way to institute a criminal proceeding, the error was procedural and could have been corrected by the Circuit Court of Appeals or by this court. The District Court certainly had jurisdiction to say whether a proceeding by information was proper or improper, and where that general jurisdiction exists and the error, if any, can be corrected by writ of error, habeas corpus is not available. Under the authorities it is respectfully maintained that this appeal should be dismissed.

Questions Involved.

If, however, the court concludes that it may consider the appeal on its merits, three questions are presented by appellant's contentions:

1. Has the United States District Court for the Eastern District of New York power to sentence prisoners convicted in the Eastern District of New York to serve the sentence in the Essex County Jail at Newark, New Jersey?

2. Is a violation of Section 21, Title II, of the National Prohibition Act (41 Stat. 305) an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States?

3. Is a sentence of 60 days in Essex County Jail, New Jersey, and a fine of $500 for violation of Section 21, Title II, National Prohibition Act, an infamous punishment within the meaning of the Fifth Amendment to the United States Constitution?

ARGUMENT.

I.

Has the United States District Court for the Eastern District of New York power to sentence prisoners to serve sentence in the Essex County Jail at Newark, New Jersey?

Almost all of thirteen pages of appellant's brief are used in arguing the negative of this question, his position being that so long as jails within the State of New York are open to receive United States prisoners the court can not send them outside the State. The point, if established, does lend emphasis to his assertion that the "defendant is in danger of infamous punishment" (hard labor), even though the pronouncement of the court does not indicate it, because New York statutes provide for "hard labor" for all convicts, and the statutes of New Jersey, where he was sentenced, only require "employment" of prisoners.

The whole question, however, of the power of the court, acting upon the designation of the Attorney General, to send prisoners outside the state to serve their sentences has been so clearly stated by Chief Justice Waite, speaking for this court in *Ex parte Karstendick* (93 U. S. 396, 400 *et seq.*), that a somewhat lengthy quotation here is more pertinent than argument:

> It is conceded that Congress has the power to provide that persons convicted of crimes against the United States in one State may be imprisoned in another. Congress can cause

a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there; or it may arrange with a single State for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them. All this is left to the discretion of the legislative department of the Government, and is beyond the control of the courts.

Acting under this power, Congress, while recognizing as a rule the propriety of sentencing those convicted of crime against the United States to imprisonment in the jails or prisons of the State where their conviction was had, did, in 1864, to meet contingencies that might arise, enact that 'all persons who have been, or may hereafter be, convicted of crime by any court of the United States, not military, the punishment whereof shall be imprisonment in a District or Territory where at the time of such conviction there may be no penitentiary or other prison suitable for the confinement of convicts of the United States, or available therefor, shall be confined, during the term for which they may have been, or may be, sentenced, in some suitable prison, in a convenient State or Territory, to be designated by the Secretary of the Interior.' 13 Stat. 74. In 1872 the power of designating was transferred to the Attorney General. This provision is also reenacted in sect. 5546 of the Revised Statutes, the word 'jail' being substituted for 'other prison', and

> 'suitable jail or penitentiary' for 'suitable prison' in the original act. This section is to be construed in connection with the other sections which have been referred to. In fact, it may be treated as a proviso to sects. 5541 and 5542.
>
> The counsel for the petitioner do not dispute the validity of this legislation; but they claim that in this case the conditions precedent to the execution of the sentence in a prison outside of the State have not been complied with, and consequently that the case is not brought within the power of the court to make such an order.

That is precisely what petitioner herein contends (pp. 11–12 of his brief), that because the State of New York has not refused to receive prisoners of the United States at some of the "houses of correction for juvenile offenders" within the State of New York, the Attorney General is powerless, under Sec. 5546, to name a jail outside the State of New York as the place where appellant is to serve his sentence. In reply to such a contention Chief Justice Waite (supra) continues:

> * * * It is not enough that the jails and penitentiaries of the State may be used; they must also be suitable. Whether suitable or not is a question of fact. * * * The statute makes it the duty of the Attorney General to designate other places of confinement, whenever the jails or penitentiaries of a State are unsuitable or unavailable. * * * The order of the Attorney General is equiva-

> lent to a finding by him that the penitentiary of the State was unsuitable or unavailable for the confinement of criminals convicted under the laws of the United States. * * *
>
> Neither is it an objection to the order, as made, that the designation of the Attorney General is of a penitentiary alone. If the sentence of the court had been imprisonment in a jail, and the jails of the State of Louisiana had been found unavailable or unsuitable, a designation of some jail outside of the State might have been necessary before the court could have ordered a confinement outside of the State.

Appellant suggests that the above reasoning in the *Karstendick* case is made obsolete by the doctrine of *In re Mills* (135 U. S. 263) and *In re Bonner* (151 U. S. 242). It is difficult to discover from these two cases where he bases the statement. *In re Mills* refers solely to whether the court could sentence to a penitentiary when the statute under which defendant was charged did not specifically so provide and the sentence imposed was for a year or less. Since it is settled that "present day imprisonment in a State prison or penitentiary with or without labor is an infamous punishment" (*Mackin* v. *United States*, 117 U. S. 348, 352) the question as to whether Mills would be subjected to hard labor was not material. Neither was it material whether the prison was in or out of the Territory or State where he was sentenced. In the *Bonner case* (supra) it is also insisted that no statement contra to the *Karstendick* decision exists. It

affirms the *Mills* decision that a judge is without jurisdiction to sentence to the penitentiary, an infamous punishment, if the statute does not plainly so provide and if the sentence is for less than a year.

The *Karstendiek* opinion is good law to-day. At a later date than either the *Mills* or *Bonner cases* it has been quoted with approval by this court. (See *United States* v. *Pridgeon*, 153 U. S. 48, p. 60.)

II.

Is a violation of Sec. 21, Title II, National Prohibition Act, an infamous crime within the meaning of the Fifth Amendment to the Constitution?

From the face of the statute there is nothing so to characterize it. The violation of Sec. 21 is called a misdemeanor and its maximum punishment is a year's imprisonment.

It appears well settled that misdemeanors punishable only by a fine or by a fine and imprisonment not exceeding one year, unless the statute couples with the punishment some additional provision making the particular misdemeanor infamous, are not infamous crimes within the purview of the Fifth Amendment, and may be prosecuted by information. (*In re Bonner*, 151 U. S. 242; *Falconi et al.* v. *United States*, 280 Fed. 766, C. C. A. 6th Circuit; *Hunter* v. *United States*, 272 Fed. 235, C. C. A. 4th Circuit; *Robertson* v. *United States*, 262 Fed. 948, 950, C. C. A. 8th Circuit; *Brown* v. *United States*, 260 Fed. 752; *Blanc* v. *United States*, 258 Fed. 921, C. C. A. 9th Circuit; *United States* v. *Camden Iron Works*, 150 Fed. 214, East. Dist. Penna.; *De Four* v. *United*

States, 260 Fed. 596, 598, C. C. A. 9th Circuit; *Weeks* v. *United States*, 216 Fed. 292, 296, C. C. A. 2d Circuit).

In *In re Bonner* (supra) Mr. Justice Field very happily puts this present contention of the Government by observing (p. 257):

> If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary (*Mackin* v. *U. S.*, 117 U. S. 348) the accusation may be made by indictment of the grand jury *or by information of the public prosecutor*. (Italics ours).

Although appellant gravely maintains that any imprisonment whatever is an infamous punishment, and, therefore, a violation of Sec. 21, National Prohibition Act, which has imprisonment as the penalty constitutes an infamous crime, his more serious contention arises from an endeavor to show that provisions of *other laws* which become operative *after sentence* is passed make the punishment infamous and thereby retroactively cause the violation of the law to be classified as an infamous crime. This brings us to the third and most important consideration in this case:

III.

Is a sentence of 60 days in Essex County Jail, New Jersey, and a fine of $500, for violation of Sec. 21, National Prohibition Act, an infamous punishment?

Appellant says it is infamous because he asserts it *means* imprisonment "at hard labor." But how does he arrive at that conclusion? It is through a devious path. He starts with an offense against a

law (National Prohibition Act), which is only a misdemeanor, the punishment for which is a fine of not more than $1,000 or not more than a year in jail, or both. (Appendix, p. 22.)

In appellant's case the court imposed a very light sentence under the statute, to wit, sixty days. But appellant proceeds by reasoning to follow this sentence, as yet innocent of any appearance of infamy or hard labor, through Sec. 5546, Rev. Stat. (Appendix, p. 23) which gives the Attorney General power to designate the place of imprisonment; on through a letter dated May 7, 1919 (Appendix, p. 24) from the Attorney General, pursuant to said statute, designating the Essex County Jail, Newark, N. J., for prisoners sentenced for less than six months. His trail of reasoning next leads through Sec. 5539 Rev. Stat. (Appendix, p. 25) providing that a Federal prisoner serving his term in the jail or penitentiary of the State shall be exclusively under the control of the State officers having charge of the State Institution under the laws of the State; after which he lands us at the climax, found in the laws of New Jersey 1917, chapter 271, paragraph I (Appendix, p. 26) providing that the board of county freeholders may "*cause to be employed* any or all prisoners in any county jail under sentence."

After all this mental "trekking" we are brought upon the lurking "infamy" which appellant contends colors the sentence so as to make procedure by indictment necessary, and it consists solely of a provision in the *State* law regarding the *management* or

discipline of State prisoners, which he says through comity between State and Nation is made applicable to Federal prisoners while housed in the State institution. The most he thus has found is a transitory possible attribute of the sentence of imprisonment which the Federal Judge imposed. For we can not lose sight of the fact that under the authority of Sec. 5546, R. S., "the place of imprisonment may be changed in any case when *in the opinion of the Attorney General* it is necessary. * * * " It is conceivable therefore, that a part of the 60 days sentence may be served in New Jersey where appellant may be made to do some work and the balance of it served in a jail of Georgia where he could be flogged but would have no employment. (Sec. 1175, Park's Annotated Code of Georgia, provides for appointment of "whipping bosses," but the only "work" required by law of prisoners in Georgia jails is on chain gangs, in which no Federal prisoners are permitted, when the labor is *imposed by the judge* as a part of the sentence. Sec. 1166, Park's Annotated Code of Georgia, Vol. 6.)

Appellant's fallacy in assuming that provisions of a state statute regarding employment of prisoners may by virtue of the comity between state and nation be tacked on the actual sentence imposed by the Federal Judge and thereby give it the character of infamous punishment is based upon a strained and unwarranted construction of Section 5539 of the Revised Statutes. (Appendix, p. 25.) It provides that Federal prisoners when placed in a State jail or penitentiary shall be subject to the same "discipline

and treatment" as other prisoners. These words were not idly chosen. They mean what they say, "discipline" referring to punishment for infraction of rules and regulations of the institution and "treatment" referring to the conduct of prison authorities toward the convicts, the privileges enjoyed, and the duties imposed by the former upon the latter. Section 5539 can not mean that *all* provisions of State laws apply to United States prisoners, else why should Congress pass Section 5544 of the Revised Statutes (Appendix, p. 26) expressly enacting that the State's law fixing the schedule of credit of time allowed State convicts for good behavior shall apply to Federal prisoners? Surely if, as appellant contends, Section 5539 of the Revised Statutes was meant to make *all* provisions of state law referring to State prisoners apply with equal force and effect to Federal prisoners, it was unnecessary for Congress by solemn enactment of Section 5544 to give Federal prisoners the advantage of the State's "good-time law."

If the general language of Section 5539, *supra*, admits of such wide interpretation as appellant advances, then State laws providing for sterilization of prisoners and their release under indeterminate sentences would also apply to United States prisoners confined in state institutions.

Section 5547 of the Revised Statutes (Appendix, p. 26), which provides that "The Attorney General shall contract with the managers or proper authorities having control of such prisoners for the * * * proper employment of them," conclusively shows that

Congress did not intend the phrase "discipline and treatment" as used in Section 5539 to include their employment.

The authority of the Attorney General under Section 5547, *supra*, to contract relative to the employment of United States prisoners is a general power given without restraint other than that their labor can not be "hired out." (24 Stat. L. 411.) A long line of authorities beginning with *McCulloch* v. *Maryland* (4 Wheat. 316) has established the principle that a State law can not interfere with the exercise of a proper power of the Federal Government. (See *Ohio* v. *Thomas*, 173 U. S. 276; *Choctaw, etc., R. R. Co.* v. *Harrison*, 235 U. S. 292.) Applying the principles of law recognized by this court in these decisions, District Judge Knowles in *County of Lewis and Clarke* v. *United States*, 77 Fed. 732, decided that a State statute authorizing the use of county jails for the confinement of United States prisoners on certain terms as to fees was not binding on the United States, as, by 5547 of the Revised Statutes, the keeping and subsistence of such prisoners *is made a matter of contract*, under the control of the Attorney General.

We maintain, therefore, that the way in which United States prisoners can be employed rests solely in contract and that a State statute on the subject can not to any extent apply unless it is made to do so by specific provisions therefor in the contract of the Attorney General.

Congress must be presumed to have enacted Rev. Stat. Sec. 5546 knowing of the constitutional require-

ment in infamous crimes; knowing also of the last clause of Rev. Stat. Sec. 1022 providing for the use of informations; knowing also of the diverse requirements of various states regarding discipline of prisoners within their institutions and aware also of Rev. Stat. Sec. 5547, passed at the same time requiring the Attorney General to contract for prisoners' employment. It is inconceivable, therefore, that appellant's contention—viz., that the test whether the punishment is infamous or not depends on what may go on inside the prison walls rather than what punishment the statute names for its violation—can be within the intent of Congress. If so, Congress deliberately *permitted the Attorney General after sentence to change the character of the punishment and thereby change also the class of the crime—simply by moving the prisoner.*

The infamy that attaches to the judge's sentencing a man to hard labor has grown up from antiquity from two historical sources. One was the conviction of a crime which made a man so lose his standing in the community that his oath was thereafter valueless (*U. S.* v. *Shepard*, 1 Abb. 431; *U. S.* v. *Baugh*, 1 Fed. 784); the other was because, in the opinion of the people, the nature of the punishment itself was so repugnant as to characterize it infamous. Early punishment was death for *all* infamous crimes. With the growth of humanitarian ideas, as States abolished the death penalty for many offenses, they felt that a loss of reputation should take the place of a loss of life and, in substituting imprisonment for

"capital" punishment, provided usually that it should be accompanied by hard labor "publicly and disgracefully imposed." Both in popular conception and in legal results in many State penitentiaries infamous punishments have come to mean solitary confinement, cropped hair, wielding a pickax on the public roads, wearing conspicuous prison stripes, a ball and chain at the ankle, and having one's labor sold to the highest bidder. In spite of these pictures of it in the popular mind *infamous punishment has legally never been clearly defined.*

An infamous offense, Cooley says, "is one involving moral turpitude in the offender or infamy in the punishment, or both." But that is a circular definition and leaves us still to inquire where the boundary lines of "infamy" in punishments lie. Some few examples have become established.

The sentence is infamous if it is to be served in a State prison or State penitentiary whether at hard labor or not. (*Mackin* v. *United States*, 117 U. S. 348; *Jones* v. *Robbins*, 74 Mass. 329; *Ex parte Bain*, 121 U. S. 1; *Ex parte Wilson*, 114 U. S. 417; *Parkinson* v. *United States*, 121 U. S. 281; *In re Mills*, 135 U. S. 263, 267; *In re Classen*, 140 U. S. 200, 205; *United States* v. *Tod*, 25 Fed. 815; *United States* v. *Smith*, 40 Fed. 755; *United States* v. *Wong Dep Ken*, 57 Fed. 206.) The sentence also is infamous if imposed under a statute which itself compels hard labor. (*United States* v. *Moreland*, 258 U. S. 433.)

While commenting on the statute under which *Wong Wing* (163 U. S. 228) was sentenced, the ma-

jority opinion of this court reasons in the Moreland decision:

> * * * but the punishment *provided for by the Act* and which was pronounced against Wong Wing, that is imprisonment at hard labor, was decided to be a violation of the Fifth Amendment * * *. When *Congress went further and inflicted punishment at hard labor* it "must provide for a judicial trial to establish the guilt of the accused." And this because such punishment was infamous and prohibited by the Fifth Amendment * * *." (Italics ours.)

It seems significant that in the last case on this subject this court should have used the expressions "punishment provided for by the Act" and "when Congress went further and inflicted punishment at hard labor." They indicate that the gist of the infamy lies in the wording of the statute under which Moreland was convicted which made it a matter of public record that an infamous sentence had been imposed upon him. The contumely therefore is not in the specific duties or discipline imposed by the institution where he may be incarcerated, but in the record against him of a "sentence at hard labor" with all the stigma of involuntary servitude legal history has attached to those words.

To apply the *Moreland case* as appellant does is entering the "twilight zone" of constitutional safeguards. It plays false to the true spirit of our "American Bill of Rights" expressed in the first ten amendments to the Constitution to construe any of them into fetters to welfare and progress. That, this

court has often recognized, and since the days when Chief Justice Marshall in *Gibbons* v. *Ogden*, 6 Wheat. 448, sounded the warning against "powerful and ingenious minds" explaining away the true meaning of the Constitution and leaving it "totally unfit for use," many have been the interpretations by this court according to its spirit. Indeed on this very subject this court has recognized the principle of growth in the guarantees of the Fifth Amendment, in *Ex parte Wilson* (supra) by saying that what constitutes infamous punishment "might be affected by the changes of public opinion from one age to another." Practically, to serve a sentence without the kind of "hard labor" required of prisoners in almost every one of the better managed jails and penitentiaries in the country to-day is much more cruel and humiliating than to serve the time where the board of freeholders or governors of the institution have provided employment. The interest manifested by them in putting in the "employment" results in a more sanitary, less vermin-infested, and cleaner place. Having no institution of its own the Federal Government must place its short-term prisoners in state and county jails, nearly all of which now have some sort of "work" for the men. All of the better ones do. The Attorney General makes every effort to designate the latter kind for Federal prisoners. In the last decade the Federal courts and United States Attorneys have been loaded with the responsibility of enforcing a great number of new statutes, named (though I do not argue that the name is conclusive)

misdemeanors. They have only small fines and jail sentences as punishment. Is the Attorney General to designate a few old antiquated jails where the prisoners sit in idleness and filth as the place where these sentences are to be served lest the "employment" in a modern institution violate the constitutional rights of prisoners? Or is the United States Attorney to keep the grand jury almost constantly in session to present these numberless minor cases?

We respectfully submit that the guarantees of the Fifth Amendment to the Constitution do not require such wastefulness and obstruction. We believe further that this court meant no such extreme conclusions to be drawn from the *Moreland* decision; that it meant and plainly said that the infamy consisted in the fact that *Congress* had pronounced the penalty "imprisonment at hard labor" which words have come to have the distinct legal meaning of "infamous punishment."

The sort of "hard labor" that Moreland was obliged to perform had points of resemblance to the "hiring out labor of prisoners" which has been condemned by the Federal government. (Act of Feb. 23, 1887, ch. 213; 24 Stat. 411, No. 1.) Moreland was committed to the workhouse for the expressed purpose of earning money he failed to pay to support his minor children. Every day's labor brought fifty cents to this fund, the earning or "working out" of which was the gist of his sentence, made so by the purpose of the statute. We submit therefore that in the majority opinion of this court Moreland's case

presented about as accurate a picture of the old hated involuntary servitude for debt or crime, which the Colonists wished to guard against in inserting the Fifth Amendment in the Constitution, as modern life could furnish. In no respect does the instant case parallel Moreland's situation.

To summarize the points of difference: Brede's sentence did not provide for hard labor; Moreland's did. The statute under which Brede was sentenced did not in so many words permit the Judge to make the imposition of hard labor a part of the record against him; the statute under which Moreland was sentenced provided that hard labor was an inescapable part of the public record of his punishment. The kind of labor to be imposed upon Brede will depend upon the Attorney General and the Warden or freeholders of the Essex County Jail, as to whether it is in fact "hard" or "light" employment; Moreland's duties were by the statute intended to be "hard labor." The employment required of appellant Brede will have no pecuniary value; Moreland's services were to be worth fifty cents per day. Brede's work will be more in the nature of health-preserving exercise, and an examination of the reasons leading to the passage of the New Jersey law, requiring "employment" of all prisoners, would indicate that the health of the prisoners had been the impelling motive for the passing of the statute. (See Report New Jersey Prison Inquiry Commission, vol. 2, p. 636.) In Moreland's case there was no concealment of the fact that the statute was intended to compel him to perform *labor*

which, presumably, he had shirked when evading the support of his minor children.

In the instant case the court had no power to administer a sentence of imprisonment at hard labor for a violation of Sec. 21, National Prohibition Act. The court's power to sentence is limited by the statute under which defendant is charged; what happens after the prisoner is within the institution is administrative merely and not a part of the sentence.

In *United States* v. *Pridgeon* (153 U. S. 48, 60) this court makes an apposite quotation from the earlier case of *Ex parte Karstendick* (supra) as follows:

> The claim was made on behalf of the petitioner that 'where the punishment *provided for by the statute* is imprisonment alone a sentence to confinement at a place where hard labor is imposed as a *consequence* of the imprisonment is in excess of the power conferred.' Mr. Chief Justice Waite, speaking for the court, answered this contention by saying: 'We have not been able to arrive at this conclusion. In cases *where the statute* makes hard labor a part of the punishment it is imperative upon the court to include that in its sentence. But *where the statute requires imprisonment alone*, the several provisions which have been just referred to place it within the power of the court at its discretion to order execution of the sentence at a place where *labor is exacted as a part of the discipline and treatment* of the institution or not as it pleases.' (Italics ours.)

Mackin v. *United States* (117 U. S. 348–351) states the test of whether the punishment is infamous or not is "whether the crime is one for which the *statutes* authorize the *court to award* an infamous punishment." (Italics ours.) That read in connection with the recent statements of this court when commenting on the *Wong Wing case* in the *Moreland* decision forces the conclusion that *for a sentence of imprisonment to be infamous, if it is for a year or less, the attribute of infamy (hard labor) must be put in the statute by Congress and made by the sentencing judge a part of the public record against the defendant.*

Respectfully submitted.

JAMES M. BECK, *Solicitor General.*

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEPTEMBER, 1923.

APPENDIX.

PROVISIONS OF LAW.

The Fifth Amendment to the Constitution reads in part as follows:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger.

Section 1022 of the Revised Statutes reads:

> All crimes and offenses committed against the provisions of chapter seven entitled "Crimes" which are not infamous may be prosecuted either by indictment or by information filed by a District Attorney.

Section 21 of the National Prohibition Act reads:

> Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall

be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

Section 5546 reads as follows:

All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a District or Territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and delivery shall be by the warden of the jail of that District; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal or the warden of the jail in the District of Columbia, only, to be paid by the Attorney General, out of the judiciary fund. But if, in the opinion of the Attorney General, the expense of transportation from any State, Territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of

imprisonment may be changed in any case, when, in the opinion of the Attorney General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: *Provided, however,* That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf.

MAY 7, 1919.

Mr. JAMES D. BELL,
United States Attorney,
Brooklyn, New York.

SIR: The designation contained in letter dated February 28, 1918, addressed to your office, of the Essex County Jail, Newark, New Jersey, as the place of confinement for defendants sentenced in your district for terms of not more than one year, is hereby amended to the extent that the Essex County Jail is designated for defendants who are sentenced to imprisonment for less than six months, and the Essex County Penitentiary, Caldwell, New Jersey, is now designated as the place of confinement for those sentenced for terms ranging from six months to one year, inclusive.

This change is made in the interest of the long-term prisoners, in view of the fact that the Essex County Jail is not equipped properly to handle prisoners sentenced for six months or over, and the authorities of that jail have requested that no more

prisoners be sent them whose terms are for six months or more.

Please present this matter to the Court, and request that these new designations be observed in future sentences, and also that prisoners now held in local institutions under sentence be committed in accordance with this designation.

For the Attorney General:

(Sgd.) WILLIAM L. FRIERSON,
Assistant Attorney General.

Section 5539 of the Revised Statutes reads as follows:

> Whenever any criminal convicted of any offense against the United States is imprisoned in the jail or penitentiary of any state or territory, such criminal shall, in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.

Section 5541 of the Revised Statutes reads as follows:

> In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.

Section 5544 of the Revised Statutes:

> The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but, in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any State for offenses against the United States shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary.

Section 5547 of the Revised Statutes:

> The Attorney General shall contract with the managers or proper authorities having control of such prisoners for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined.

Laws of New Jersey, 1917, chapter 271, par. 1, reads:

> The board of chosen freeholders of any county in this State may cause to be employed within such county any or all prisoners in any county jail under sentence, or committed for nonpayment of a fine and costs, or committed in default of bond for nonsupport of the family.

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